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Independent Schools in Scotland: Should they be Charities?

PATRICK FORD

I. Introduction

Scotland's education system is distinct from the system in England and Wales and falls within the competence of the devolved Scottish institutions.¹ For the vast majority of children and young people in Scotland, school education is provided free of charge by the state, at secondary level in comprehensives. In 2015, the Organisation for Economic Co-operation and Development (OECD) delivered a 'could do better' verdict on school education in Scotland.² The Scottish Government responded with a programme of reform incorporating a draft Education (Scotland) Bill intended 'to play a transformative role in achieving excellence and equity' in the Scottish education system by addressing the main weaknesses identified.³ Against the background of an accepted need to transform the Scottish system for the better, it is not surprising that many families who can afford to do so pay substantial fees to have their children and young people educated in independent schools which operate outside the main framework for state schools. A recent internal report on quality and improvement in Scottish education commented generally favourably on the performance of independent schools.⁴

Independent schools cater for only a small minority of children and young people in Scotland. In principle, apart from certain special schools, they receive no direct financial support from the state and depend for their funding largely on the fees charged for the educational service they provide, although most mainstream independent schools are charities and benefit in that capacity from the tax reliefs accorded to all charities. The fees charged typically by the mainstream schools are

¹ Scotland Act 1998, ss 29(2)(b), 30, sch 5: education is not a reserved matter.

² OECD, *Improving Schools in Scotland: An OECD Perspective* (OECD, 2015) 9–12, 19–23.

³ Scottish Government, Draft Education (Scotland) Bill: Draft Policy Memorandum (Scottish Government, 2018) para 3.

⁴ Education Scotland, *Quality and improvement in Scottish education 2012–2016* (Education Scotland, 2017) 32–34.

far beyond the reach of most families in Scotland, and while the schools provide some financial support to enable attendance by children and young people whose families cannot meet their charges, the pupils supported in this way amount to only a small proportion of those who attend independent schools. The net result is that education in independent schools in Scotland is largely the preserve of those whose families can afford to pay substantial fees.

Is this fair? An insistent current of opinion in Scotland thinks not. This chapter addresses three main questions in the light of that view. Should independent schools be abolished? If not, should they be excluded from charitable status? If not, should they be allowed the full range of tax reliefs accorded to charities generally? The first of these is a question of educational policy to be answered in accordance with a person's wider vision of society: an egalitarian will answer it differently from a free-market liberal, and a social democrat will answer it differently again. No answer to that question is offered here – it belongs in a debate on educational policy, not in a debate in charity law – but asking it is an important preliminary to the second question, which is a matter of debate in both educational policy and charity law. At present in Scotland, an independent school may qualify for charitable status and its accompanying tax reliefs if it meets certain 'public benefit' requirements. Whether independent schools should continue to be supported indirectly by charity tax reliefs is a matter, ultimately, of educational policy, while the development in detail of those requirements has up to now been a matter of charity law. It is argued here, following an examination of the present system and the possibility of excluding independent schools from charitable status on two alternative approaches – the 'sink-or-swim' or 'education, not charity' alternatives – that, on balance, if independent schools are not to be abolished, the status quo should be maintained.

The third question has been prompted by the 'Barclay bombshell'. Unexpectedly, in 2017, the Barclay Review of Non-Domestic Rates in Scotland ('Barclay') recommended that the existing relief from non-domestic rates accorded to charities should be withdrawn from independent schools, which would otherwise retain their full charitable status and entitlement to other tax reliefs.⁵ With some nuances, the Scottish Government has accepted that recommendation, which is to be implemented by a Bill currently before the Scottish Parliament.⁶ The third question has therefore been answered in Scotland in the negative – independent schools are not to be allowed the full range of tax reliefs accorded to charities generally. It is suggested here that, while it might have been preferable to maintain this aspect of the status quo along with the rest, if the existing 80 per cent mandatory relief is to be withdrawn, a case can be made for leaving local authorities with full discretionary power to remit the rates of independent schools up to 100 per cent.⁷

⁵ Kenneth Barclay, *Barclay Review of Non-Domestic Rates in Scotland* (Scottish Government, 2017) para 4.120.

⁶ SP Bill 44 Non-Domestic Rates (Scotland) Bill Session 5 (2019), s 10 [amending Local Government (Financial Provisions, etc) (Scotland) Act 1962, s 4].

⁷ See LG(FP)(S)A 1962, s 4(5).

The chapter concentrates on Scotland, but its three main questions have resonances in a long-standing debate in England and Wales on the charitable status of independent schools. A tentative contribution to that debate from Scotland is offered in the conclusion to the chapter, with due deference to the larger jurisdiction and its more complex and mature charity law.

II. Scottish Independent Schools in Context

The main system of state schools in Scotland provides for some 690,000 pupils in approximately 2,500 schools.⁸ Scottish local authorities have direct responsibility for all state schools in their area, within a legislative and policy framework overseen by the Scottish Government, and subject to curriculum and inspection regimes administered by its agency, Education Scotland.⁹ The comprehensives system was introduced in 1965, replacing a system of senior and junior secondary schools in which the senior secondaries served pupils selected at 12 as academically suitable for university entrance. Selection ended, and after some transitional resistance, comprehensive schooling at secondary level came to be embraced as the appropriate norm for a democratic Scotland.¹⁰

While the main state system is homogenous at secondary level in that all schools are comprehensives, it is accepted that there are significant variations of quality across the system, and the broad aim of the ongoing reform prompted by the OECD report is 'to close the unacceptable gap in attainment between [the] least and most disadvantaged children and to raise attainment for all'.¹¹ The key theme of the reform is 'empowering schools' – empowering them, that is, by increasing their autonomy and emancipating them to a degree from local authority oversight, principally by strengthening the decision-making powers of individual head teachers and enhancing the mainly consultative role of the existing parent councils.¹² Regional Improvement Collaboratives are being established in response to 'the need to strengthen and support educational leadership and to ensure that mutual support and learning across educational authorities and networks of schools is provided'.¹³

⁸ Scottish Government, *Summary Statistics for Schools in Scotland 2018* (Scottish Government, 2018).

⁹ OECD, *Improving Schools* (n 2) 35–39. For the legislative framework, see www.education.gov.scot ('Legislation').

¹⁰ D Murphy et al (eds), *Everyone's Future: Lessons from Fifty Years of Scottish Comprehensive Schooling* (London, Institute of Education Press, 2015) chs 1 and 2.

¹¹ Scottish Government, *Empowering Schools: A Consultation on the Provisions of the Education (Scotland) Bill* (Scottish Government, 2017) 1.

¹² Scottish Government, Draft Policy Memorandum (n 3) paras 3, 4, 25–28, 31. The aims of the Draft Bill are currently being pursued under an agreement with local authorities which may obviate the need for legislation: Scottish Government, *Education Reform – Joint Agreement* (Scottish Government, 2018).

¹³ Scottish Government, Draft Policy Memorandum (n 3) para 29.

There are some 90 independent schools in Scotland, of which around a third are specialist providers of additional support needs education.¹⁴ Of the 60 or so mainstream independent schools, almost all are charities and members of the Scottish Council of Independent Schools (SCIS),¹⁵ these schools making up what is normally thought of as the independent schools sector in Scotland. In round figures, they serve some 30,000 pupils, or 4.1 per cent of pupils educated in Scotland, mostly in day schools, but the SCIS membership includes 19 mainstream boarding schools, serving some 2,750 boarders, 35 per cent of whom are from overseas.¹⁶ Two thirds of the pupils who attend independent schools in Scotland do so in Glasgow, Edinburgh or Aberdeen, and more than a quarter of secondary pupils in Edinburgh attend independent schools.¹⁷

Some of the largest independent day providers are long-established endowment and 'proprietary' schools, either founded or adapted from earlier institutions to meet the educational needs of the burgeoning middle class of nineteenth century Scotland.¹⁸ In the pre-comprehensives era, many came to be part-funded by direct grants from the state as academic equivalents of the senior state secondaries, and after 1965 had the opportunity to opt into the main state system as comprehensives. Some of the most prominent, however, chose not to, preferring to retain control of their academic ethos as independently-funded schools.¹⁹

Independent schools are independent of local authority control but not wholly independent of the state: a system of compulsory registration and light-touch regulation integrates them into the overall framework of educational provision in Scotland.²⁰ Registration entails periodic inspections by Education Scotland, but independent schools are largely autonomous academically and operationally and are free, in particular, to select by academic aptitude. The schools are not subject to the ongoing reform of the main state sector. The state guarantee of minimum standards through registration may be seen as underpinning the effects of the market: families will only pay substantial fees to a mainstream independent school if they perceive the educational provision being offered to be of a markedly higher standard than that available free of charge in the main state system.

Fees are the life-blood of the independent sector. Charity tax reliefs apart, the direct funding for the larger schools comes generally from a combination of fees, investment income, donations and legacies, but the cost of delivering modern education is such that even schools supported by originally generous endowments

¹⁴ Scottish Government, *Registered Independent Schools in Scotland: June 2019* (Scottish Government, 2019) www.gov.scot/publications/independent-schools-in-scotland-register/.

¹⁵ See Scottish Charity Register (www.oscr.org.uk) and SCIS (www.scis.org.uk).

¹⁶ SCIS, *Annual Census 2018* (www.scis.org.uk/facts-and-figures).

¹⁷ OECD, *Improving Schools* (n 2) 36. The figures are for 2013/14.

¹⁸ R Anderson, *Scottish Education since the Reformation* (Economic and Social History Society of Scotland, 1997) 34, 35. See, eg, Edinburgh Academy, founded by subscription in 1824; and George Heriot's School, founded in the 17th century as a 'hospital' for 'puir, fatherless bairnes'.

¹⁹ Murphy, *Everyone's Future* (n 10) 5, 6.

²⁰ See Education (Scotland) Act 1980, pt V and associated regulations; also Scottish Government, *The Registration of Independent Schools in Scotland: Guidance Notes* (Scottish Government, 2014, 2015).

inevitably rely on fees as their main source of income.²¹ Boarding fees for a senior pupil can exceed £40,000 for a school year;²² an endowment day school in Glasgow quotes over £12,500 a year for a senior pupil, and a 'proprietary' equivalent in Edinburgh over £14,500.²³ There is little doubt, therefore, that, but for facilitated access, the education offered by a mainstream independent school is far beyond the reach of the average Scottish household.²⁴

III. Should Independent Schools be Abolished in Scotland?

This is a question to be answered as a matter of educational policy, not charity law, but the general arguments offered on either side, in Scotland as in England and Wales, provide the backdrop for the main question for the chapter: whether independent schools should be excluded from charitable status. At the risk of oversimplification, the arguments for abolition can be characterised as egalitarian, as championed by official Labour party policy before the advent of New Labour and again finding favour in today's party.²⁵ On the other side, the traditional 'freedom of choice' argument against abolition can be characterised as representative of the free-market liberalism of Margaret Thatcher's Conservatives.²⁶ The policy behind the status quo in Scotland – independent schools are not only tolerated but eligible for charitable status, which can be used to oblige them to reach out beyond their immediate fee-paying beneficiaries – may be traced to a social democratic strand in the educational ideology of Labour under Tony Blair: the merits of free choice and economic liberalism are acknowledged but their adverse social consequences are to be mitigated by state intervention.²⁷

For abolition, it is said that independent schools are socially divisive. No doubt the main target for this charge in the context of educational provision

²¹ See, eg, Governors of the Fettes Trust, *Report and Financial Statements 2017–18* (www.fettes.com).

²² Eg, Gordonstoun (www.gordonstoun.org.uk).

²³ Hutchesons' Grammar School (www.hutchesons.org); Edinburgh Academy (www.edinburghacademy.org.uk).

²⁴ Research commissioned by OSCR in 2008 found that 'charges of up to £1,500 annually do not appear to significantly impact on the ability to pay for the vast majority of Scottish families (with income above income support)': *Statement on use of ability to pay research and model* (OSCR, 2009) para 12.1.

²⁵ See D Morris, *Schools: An Education in Charity Law* (Aldershot, Dartmouth Publishing, 1996) 24–29; and, generally, F Green and D Kynaston, *Engines of Privilege: Britain's Private School Problem* (London, Bloomsbury, 2019) for a forceful restatement of the arguments. The Labour Conference 2019 resolved to 'integrate all private schools into the state sector' progressively by withdrawing tax reliefs, removing charitable status and, ultimately, redistributing their assets 'democratically and fairly across the country's educational institutions': *The Financial Times*, London, 22 September 2019.

²⁶ Green and Kynaston, *Engines of Privilege* 195.

²⁷ A Dunn, 'Using the Wrong Policy Tools: Education, Charity and Public Benefit' (2012) 39 *Journal of Law and Society* 491–514, 496; L Paterson, 'The Three Educational Ideologies of the British Labour Party, 1997–2001' (2003) 29 *Oxford Review of Education* 165–186, 166.

for the UK as a whole is the long-established sub-system of 'public schools', in reality expensive private boarding schools serving principally a constituency of well-off fee-payers from across the country, rather than their local communities. On an egalitarian view, these schools are breeding grounds for a self-perpetuating elite with privileged access to the best universities and jobs. While most of Scotland's mainstream independent schools are day schools with strong links to their localities, and few of the boarding schools fit the stereotype of the English public school,²⁸ a less stark social division can be identified between the pupils and alumni of the large independent day schools and the pupils and alumni of the modern Scottish comprehensive. Schools from either side of the divide which previously had much in common – the endowment and proprietary schools and the senior state secondary schools were once recognisably equivalents²⁹ – have grown apart since the advent of comprehensive schooling: socially, by virtue of the ever higher fees charged by independent schools, and educationally, not only in the type of education offered but also, if the OECD's criticisms are accurate, in the higher quality of education available in the independent sector, at least across the board.³⁰ Again, the concern of the egalitarian is that a privileged middle class becomes self-perpetuating through its fee-charging schools and that others are shut out from the opportunities they offer; independent schools are out of kilter with the aspirations for a classless society represented by the comprehensives and should be got rid of.

For abolition, it is also said that independent schools undermine the main state system by siphoning off talented pupils and staff who might otherwise contribute to higher standards.³¹ So, too, the perceived need to boost the effectiveness of parent councils in the current reform suggests that the state schools may be the weaker for the loss of input from motivated middle-class parents whose engagement with their children's education is evidenced by their willingness as well as ability to pay fees.

Against abolition, the free-market liberal would counter with the principle of choice: families who can afford to pay for what they see as a superior education for their children, in many cases at the cost of considerable sacrifice in other areas of family expenditure, should be free to do so. More pragmatically, it may be argued that the independent sector makes an important contribution to Scotland's educational provision overall, which the main state system would be hard pressed to replicate, in terms of both funding and quality of provision, if the sector were abolished.³² In the same vein, it may be said that the sector makes an important

²⁸ Of the 19 SCIS schools designated as boarding schools, 12 serve more day pupils than boarders (www.scis.org.uk).

²⁹ Anderson (n 18) 51.

³⁰ OECD, *Improving Schools* (n 2) 10–12.

³¹ Ability-related scholarships and teacher-pupil ratios may be cited. SCIS member schools serve 4.1 per cent of pupils in Scotland but employ 6.6 per cent of teachers: SCIS, *Annual Census 2018* (n 16).

³² See Biggar Economics, *Economic Impact of Scottish Independent Schools: A report to SCIS* (SCIS, 2016) 7.1.

indirect contribution to the Scottish economy beyond its direct contribution to education, much of which would be lost, the argument goes, if the independent sector, funded as it is principally by private money, some of it from outside Scotland, were abolished by full absorption into the state-funded system.³³

Whatever the merits of the competing arguments, representative as they are of competing visions of society, there is limited momentum at present for the abolition of independent schools in Scotland and the focus of debate is firmly on their charitable status.³⁴ While not articulated in any formal policy document, the attitude of the Scottish Government could until recently be taken as one of tacit acknowledgement of the positive contribution of independent schools to the provision of school education in Scotland and acquiescence in the status quo: the system of registration and light-touch regulation has been kept up to date,³⁵ and calls for removal of charitable status have been quietly resisted.³⁶ After all, most independent schools already possess the main characteristics which state schools are being encouraged to adopt under the current reform: operational autonomy, in the sense in particular of emancipation from local authority control, strong headteacher leadership and committed input from parents.

The Scottish Government has plenty on its hands already with its reform of the main state system, and a pragmatic approach to the independent sector must have obvious attractions: independent schools are generally good schools and Scotland needs good schools, so why not leave them alone to get on with what they do well? For an administration juggling with funding priorities, it is no small consideration that they require no direct funding from the state. But this pragmatism has a social democratic dimension: independent schools are allowed to flourish, funded by high fees, but required to mitigate the resulting exclusiveness by public benefit commitments enforced through the charities system.

IV. Scottish Independent Schools as Charities

Charitable status in Scotland, a devolved matter, entails compliance with a regulatory regime provided for by the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act), overseen by the Scottish Charity Regulator (OSCR).³⁷

³³ Ibid, generally, including 7.5 on 'Exports'.

³⁴ Paul Sweeney MP, shadow Scotland Office minister, recently suggested that 'all private schools should be brought, en masse, into the state sector': J Boothman, 'Labour targets Scotland's "elitist" private schools' *The Sunday Times* (London, 16 June 2019). The remark anticipates the Labour Conference resolution of September 2019 (see n 25). Scottish Labour is not the force it once was and its prospects of implementing such a policy at devolved level must be in doubt.

³⁵ Eg, by the Registration of Independent Schools (Prescribed Person) (Scotland) Regulations 2017.

³⁶ As at 8 February 2017, the Scottish Government did 'not have any plans to review the charitable status of independent schools': answer to Written SP Question S5W-06644.

³⁷ Scotland Act 1998, ss 29(2)(b), 30, sch 5, Pt II, C 1; Charities and Trustee Investment (Scotland) Act 2005 (2005 Act), s 1. OSCR oversees some 24,500 charities: www.oscr.org.uk.

A body becomes a charity by registration in the Scottish Charity Register and on applying for registration must meet a statutory 'charity test' which forms part of the regime.³⁸ A body which is already registered must meet the charity test on an ongoing basis and is liable to periodic review.³⁹ Most of the independent schools currently entered in the register were transferred under transitional provisions from an index of 'Scottish charities' maintained by HMRC under the previous regime for the regulation of charities in Scotland, having been admitted to the index as bodies entitled to charity tax relief under the prevailing fiscal legislation by virtue of their 'charitable purposes' in the meaning of the term in the law of England and Wales.⁴⁰ Following transfer, the schools were the subject of a systematic review of their conformity with the charity test.

A. Policy Background to Review of Fee-Charging Schools

The policy background to the schools review is best understood in the light of an attempt by Tony Blair's Labour Government to harness charitable status in England and Wales as a tool of social democratic intervention in the world of independent schools. Labour had moved away from its earlier policy of abolition, failing which exclusion from charitable status, in favour of pushing fee-charging schools towards widened access for those unable to pay and operational partnerships with schools in the state sector.⁴¹ Hopes were placed in an adjustment in the Charities Act 2006 of the public benefit component of the definition of 'charitable purpose' in English law. It had been an apparent feature of the relevant case law that certain purposes, including those for the advancement of education, were presumed to be for the public benefit. The 2006 Act provided for removal of the presumption, but otherwise left the public benefit requirement to be governed by the cases.⁴²

There was initial uncertainty over the effect of this change, but the interventionist view was that charities thought to have sheltered under the presumption, such as independent schools, would have their public benefit credentials scrutinised as never before.⁴³ The Charity Commission went so far as to issue guidance suggesting that it could subject a charity's fees to a reasonableness test, to ensure that access to benefit was not unreasonably restricted by a person's ability to pay, and setting out various ways of meeting the test which chimed with the underlying social democratic objectives for independent schools.⁴⁴ When the guidance was

³⁸ 2005 Act, ss 3–9. A 'body' may be constituted in a variety of legal forms: s 106.

³⁹ 2005 Act, s 3(6).

⁴⁰ 2005 Act, s 99; Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, pt I (repealed in part); Income and Corporation Taxes Act 1998, s 505 (repealed).

⁴¹ See n 25 and Dunn (n 27) 500 ff.

⁴² Charities Act 2006 Act, ss 2, 3; see now Charities Act 2011, ss 2, 4.

⁴³ Dunn (n 27) 502; J Warburton, 'Charities and public benefit – from confusion to light?' (2008) 10 *Charity Law and Practice Review* 1–25, 13–20.

⁴⁴ Charity Commission, *Charities and Public Benefit* (Charity Commission, 2008); *Public Benefit and Fee-charging* (Charity Commission, 2008) C.

judicially examined on the initiative of the Independent Schools Council (ISC) (the *ISC* case), it was held, in effect, that the apparent presumption of public benefit was illusory, so that its supposed removal had no impact on the substance of the case law, and that the cases provided no warrant for the Charity Commission's reasonableness test.⁴⁵ A school providing mainstream education could meet the public benefit requirement even if those who benefited from the provision were largely from families who could afford to pay substantial fees so long as the 'poor' were not entirely excluded.⁴⁶ Provision for the 'poor' as beneficiaries must go 'beyond the de minimis or token', but satisfaction of the public benefit requirement was otherwise a matter for the discretion of charity trustees.⁴⁷

Before its emasculation in the *ISC* case, the English initiative had had an indirect influence in Scotland. Although not fully articulated, the social democratic purpose underlay assurances given by the then Scottish Executive, a Labour-Liberal Democrat coalition, during parliamentary consideration of the charity test: 'The Bill guarantees an objective test. The aim is not to attack independent schools – some of them will be in and some of them will be out';⁴⁸ and more generally: '[C]harging a fee so that access is granted will not automatically prevent bodies from being deemed as charities'.⁴⁹ In principle, therefore, independent schools would still be able to charge fees and enjoy charitable status as under the previous law, but more would be demanded of them under the new charity test. The working out of the test was left largely to OSCR, which in the event developed an approach to fee-charging very similar to the one the Charity Commission was forced to abandon by the *ISC* case. This is not surprising: the two regulators were committed to finding a common position on public benefit 'wherever possible', despite the differences between the Scottish charity test and English charity law.⁵⁰

B. Advantages of Charitable Status in Scotland

In Scotland, charitable status and its advantages – the *quid pro quo* for the provision of public benefit – flow from registration in the Scottish Charity Register. For independent schools, the key advantages at Scottish level are entitlement to

⁴⁵ *R (Independent Schools Council) v Charity Commission* [2011] UKUT 421 (TCC). See Dunn (n 27) 504–505; also M Syngé, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Oxford, Hart Publishing, 2015) ch 8.

⁴⁶ The *ISC* case (n 45) paras 177, 178. 'Poor' does not necessarily mean destitute: persons of 'modest means' or 'not very well off' may count as 'poor' in appropriate circumstances: para 179.

⁴⁷ *Ibid* paras 215–218. The 2008 guidance was withdrawn and replaced: see especially Charity Commission, *Public benefit: running a charity* (Charity Commission, 2013) Annex C.

⁴⁸ Deputy Minister for Communities, *Communities Committee OR* (20 April 2005) col 2083.

⁴⁹ Deputy Minister for Communities, *Scottish Parliament OR* (9 June 2005) col 17853.

⁵⁰ OSCR/Charity Commission, *Memorandum of Understanding between OSCR and the Charity Commission* (OSCR, 2007) annex 3, para 2. The influence appears to have been mutual: while the underlying policy originated in England and Wales, the Charity Commission's 2008 guidance may have drawn on OSCR's 'pilot' application of the charity test to Dundee High School (see n 63 below): Syngé, *The 'New' Public Benefit Requirement* (n 45) 180.

use the charity 'brand',⁵¹ relief from non-domestic rates,⁵² and relief from Scottish land and buildings transaction tax (LBTT).⁵³ At UK level, registration with OSCR puts beyond doubt satisfaction of the 'registration condition', one of a cluster of conditions of eligibility for UK charity tax reliefs provided for by the Finance Act 2010, of which another is the requirement that a claimant is established for 'charitable purposes' only in the sense of the term in the law of England and Wales.⁵⁴ A school which has met the Scottish test will almost certainly also meet the English charitable purposes test, which, as understood in the light of the *ISC* case, is, on the determinative issue of fee-charging, less stringent. It may be noted, however, that in certain circumstances the registration condition may also be met by a body established in Scotland which is not registered with OSCR.⁵⁵

It is the tax reliefs which make the charitable status of independent schools controversial. As things stand, schools registered with OSCR are entitled to mandatory relief to the extent of 80 per cent from non-domestic rates, with discretion to the local authority to grant further relief up to 100 per cent, reliefs which are significant on an annual basis both for individual schools in savings and for local authorities in rates lost.⁵⁶ The value of the other reliefs is harder to estimate, since relief from LBTT at Scottish level is a function of transactional activity which varies from school to school and from year to year, and calculating the total tax saved or lost at UK level is complex because of the range of taxes involved, their differing impacts on individual schools, and the absence of sufficiently detailed statistics.⁵⁷ Nonetheless, a school's entitlement to reclaim tax on donations under the Gift Aid scheme may be highlighted as likely to be significant for most schools;⁵⁸ so also, it would be a significant blow for most schools if Value Added Tax were to be charged on school fees.⁵⁹

Just as a body becomes a charity by being entered in the Scottish Charity Register, it ceases to be a charity on being removed from the register, whether at its

⁵¹ In principle, only bodies entered in the register may call themselves charities in Scotland: 2005 Act, ss 13, 14.

⁵² Local Government (Financial Provisions etc) (Scotland) Act 1962, s 4(2), (5), (10).

⁵³ Land and Buildings Transaction Tax (Scotland) Act 2013, s 27(1), sch 13, paras 1, 15(1)(a).

⁵⁴ Finance Act 2010, s 30, sch 6, paras 1(1), (4), 3(1), (3); Charities Act 2011, ss 2, 7.

⁵⁵ The registration condition demands that a claimant comply with 'any requirement' to register (FA 2010, sch 6, para 3(1), (3)), but in Scotland a body is free to pursue charitable purposes without being registered so long as it does not call itself a charity: 2005 Act, ss 13, 14.

⁵⁶ See n 52. The direct cost to mainstream independent schools of removal of charity rates relief is estimated at £7 million for 2020–21: Non-Domestic Rates (Scotland) Bill Financial Memorandum (SP Bill 44-FM, Session 5, 2019) paras 34–39, Table 1.

⁵⁷ See *Charitable Status and Independent Schools* (House of Commons Library Briefing Paper No 05222, 19 September 2017) para 1.4; and, generally, *UK Charity Tax Reliefs Statistics 1990–91 to 2017–18* (HMRC, 2018).

⁵⁸ Gift Aid paid to all charities registered in Scotland (of which some may also be registered in England and Wales or Northern Ireland) amounted to £80 million in 2018: response to Written PQ, Commons 216364 (4 February 2019).

⁵⁹ As proposed in *For the Many, Not the Few: The Labour Party Manifesto 2017*, 38. The measure is now one of a more radical set of proposals: see n 25.

own request or if it fails the charity test on a review by OSCR.⁶⁰ On removal, the body loses the advantages of charitable status but remains under a duty to apply its pre-removal assets, and any income arising, in accordance with its purposes as they stood immediately before removal; and the de-registered body, though no longer a charity, must continue to submit annual accounts to OSCR in respect of its pre-removal assets, and remains subject to a residual regime of enforcement by OSCR and the Court of Session.⁶¹ This 'asset lock' protects past donors to the body, but operates, in combination with loss of the advantages of charitable status, as a significant disincentive to voluntary removal from the register and, by the same token, as a significant incentive to taking any steps identified by OSCR, on a review, as necessary for a body to meet the charity test and remain in the register.

As a mechanism for social democratic intervention, therefore, charitable status in Scotland can be seen to operate by carrot and stick. The advantages of charitable status are the carrot, the reward for provision of public benefit in forms acceptable to the state; the stick is removal from the register if, on a review, the charity's public benefit offering is found to fall short of the mark.

C. The Charity Test as Applied to Independent Schools

Independent schools were identified early on as one group of charities transferred from HMRC's index with a 'high likelihood' of failing the charity test on review because of the restrictive effect of high fees on access to benefit.⁶² A review of all 52 of the schools transferred was undertaken over a period of seven years. Forty of the schools met the charity test on first assessment; 10 failed it initially but were given an opportunity to take remedial steps to enable them to meet the test and did so, all being found to satisfy the test on reassessment; of these, nine were required to adjust their fee-charging practices; the reviews of the remaining two schools were suspended for reasons unconnected with the test.⁶³

The 2005 Act provides that a body meets the charity test if (a) its purposes consist only of one or more of 16 specified charitable purposes, which include

⁶⁰ 2005 Act, ss 18, 30.

⁶¹ 2005 Act, s 19. In Scotland there is no equivalent of the English rule against the validity of non-charitable purpose trusts: where the body of trustees of a Scottish public trust (a trust benefiting the public or a section of the public) is de-registered, the trust will continue in existence under the general law of trusts.

⁶² OSCR, *Fee-charging schools, public benefit and charitable status* (OSCR, 2014) para 4. The schools review was originally part of a planned 'Rolling Review' of all charities in the register, subsequently abandoned in favour of a risk-based system of 'targeted regulation': see OSCR, *Protecting charitable status: A report on individual charity reviews 2006–11* (OSCR, 2012) 46.

⁶³ *Fee-charging schools* (n 62) para 1 and app listing the schools reviewed. For review reports on individual schools, see OSCR, *Rolling Review: Pilot Study Report* (OSCR, 2007) paras 5.6–5.6.4 and apps ('pilot' review of Dundee High School); *Rolling Review – Phase 1a: OSCR decisions on 30 charities* (OSCR, 2008); *Protecting charitable status* (n 62); and (for most reports) *Charitable status reviews – schools* (www.oscr.org.uk). See Syngé (n 45) 173–180 for a full analysis.

the advancement of education, and (b) it provides (or, in the case of an applicant for registration, provides or intends to provide) public benefit in Scotland or elsewhere.⁶⁴ It is for OSCR to decide whether a body provides public benefit, subject to directions requiring it to have regard (inter alia) to:

- (a) how any ... disbenefit incurred or likely to be incurred by the public ... in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
- (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.⁶⁵

The charity test was derived from the definition of charity for England and Wales but has some distinctive characteristics.⁶⁶ First, there is no requirement to read the statutory provisions in the light of the extensive case law on the English definition: the public benefit component of the charity test is intended to 'encapsulate' the relevant case law, but there is no requirement for OSCR to look beyond the bare terms of the statute.⁶⁷ Secondly, OSCR's assessment of whether a body provides public benefit is an activities test: OSCR must check that the purposes in the body's constitution are all charitable, and that its activities are consistent with its purposes, but the question of whether the body provides public benefit is to be assessed on the basis of what it does, including what fees it charges, as matters of fact.⁶⁸ Thirdly, the charity test is 'holistic': OSCR's task is an assessment of the body's activities taken as a whole, not an analysis of whether each of its individual purposes, if more than one, is for the public benefit.⁶⁹ Fourthly, the charity test authorises OSCR to submit a charity's fees to a reasonableness test.⁷⁰

But for the issue of fee-charging, application of the charity test to a mainstream independent school is comparatively straightforward: a school's main purpose or purposes will inevitably fall within 'the advancement of education', and the main benefit it provides will be a 'school education' – a 'progressive education

⁶⁴ 2005 Act, s 7(1). The charitable purposes, set out in s 7(2), are in effect 'descriptions of purposes': cf Charities Act 2011, s 3. Further provisions secure the non-profit and non-party political character of charities and their independence from central government: 2005 Act, s 7(4).

⁶⁵ 2005 Act, s 8(2).

⁶⁶ For an English perspective on the test, see Synge (n 45) ch 7. See also S Cross and P Ford, *Greens Annotated Acts: Charities and Trustee Investment (Scotland) Act 2005*, 2nd edn (London, W Green, 2017) paras 8.03–8.06, 9.03–9.26.

⁶⁷ Minister for Communities, *Scottish Parliament OR* (9 March 2005) col 15097; cf Charities Act 2011, ss 3(3), 4. 2005 Act, s 8(1) provides that no particular purpose is to be presumed to be for the public benefit, echoing removal of the supposed presumption in England and Wales but with even less significance in Scotland because the English public benefit cases form no part of the charity test: cf Charities Act 2011, s 4(3).

⁶⁸ OSCR, *Meeting the Charity Test: Guidance for applicants and existing charities* (OSCR, 2015) 7. Cf the ISC case (n 45) paras 73, 188–191.

⁶⁹ OSCR, *Pilot Study* (n 63) 86 (app 4, Conclusion); cf Charities Act 2011, ss 1(1)(a), 2(1)(b).

⁷⁰ 2005 Act, s 8(2)(b).

appropriate to the requirements of pupils, regard being had to the[ir] age, ability and aptitude⁷¹ – but a school's contributions to the wider community will also count as positives in OSCR's holistic assessment of public benefit. On the other hand, in its weighing of disbenefit incurred against benefit gained, OSCR disregards any detrimental impact independent schools may be said to have on the state schools in their area or on society in general, whether by undermining standards or entrenching social divisions, on the basis that any negative effects are insufficiently supported by evidence, and that such considerations belong in any case to a general critique of the independent schools sector rather than the assessment of a particular school.⁷²

D. Fees as Restrictive Conditions

The direction in the 2005 Act on restrictive conditions comes into play in the case of a mainstream independent school because its main benefit, a school education, is provided to a section of the public only – children and young people of school age. OSCR must therefore have regard to whether any condition on obtaining the benefit, including any charge or fee, is 'unduly restrictive'. OSCR's gloss on the statutory formula is that an unduly restrictive condition is a limit – whether arising from a body's constitution or de facto – 'on who can access the benefit provided by an organisation where the restriction is not reasonable or justifiable in the context of what the organisation does and what its purposes are, or is unlawful'.⁷³ The direction on restrictive conditions, in other words, is a reasonableness test.

Surprisingly, perhaps, none of the schools assessed was found to have unduly restrictive policies on admission to benefit by academic aptitude and ability. OSCR's view is that academic selection can be justified if its purpose is no more than to select out those who 'would have particular difficulty in coping with the type of education provided';⁷⁴ or, more positively, to ensure that those admitted would 'benefit from the wide range of opportunities offered to them'.⁷⁵ These are notably milder forms of selection than the strict academic selection at 12 applied in both state and independent sectors in the pre-comprehensives era.

The charging of fees, on the other hand, generally at a level well beyond the spending-power of most Scottish households, is clearly a limit on who can access the benefit provided by a mainstream independent school which requires robust justification if it is not to be considered unreasonable.⁷⁶ It would have been within

⁷¹ Education (Scotland) Act 1980, s 1(5), as adopted in OSCR, *Pilot Study* (n 63) para 5.6.1.

⁷² OSCR, *Pilot Study* (n 63) para 5.6.3; cf the ISC case (n 45) paras 96, 97, 108, 109.

⁷³ OSCR, *Meeting the Charity Test* (n 68) 88.

⁷⁴ OSCR, *Pilot Study* (n 63) para 5.6.3.

⁷⁵ OSCR, 'The Governors of the Fettes Trust. Scottish Charity Number: SC017489. Inquiry Report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act)' (www.oscr.org.uk/media/1498/inquiry-report-the-governors-of-the-fettes-trust.pdf, 2013) 5.

⁷⁶ See n 24.

the scope of OSCR's discretion simply to say that a school's fees are unduly restrictive and unreasonable if, as a matter of fact, they shut out from benefit a clear majority of the school's theoretical beneficiary class, and that is no doubt what was hoped for by those who pressed for express reference to charges and fees in the charity test.⁷⁷ That would have excluded almost all mainstream independent schools from charitable status.⁷⁸ But it was also within OSCR's discretion to proceed as it did, broadly in line with ministerial expectations. OSCR underpinned its approach with a set of principles on fee-charging for charities generally which still form part of its guidance on meeting the charity test.⁷⁹ Although under no obligation to take account of the law on public benefit in England and Wales, OSCR clearly took as the starting point for its five principles the traditionally permissive approach to fees of the English case law,⁸⁰ while at the same time exploiting the potential for social democratic intervention inherent in the statutory reasonableness test.

OSCR couches its five general principles as 'What we look at when we consider fees and charges': (1) help for those who cannot pay; (2) the full scope of the benefit provided; (3) proportionality; (4) transparency; (5) the cost of providing benefit is relevant. Crucially for independent schools, OSCR recognises under the fifth principle that charities must be able to cover the cost of providing benefit, including provision for future sustainability, even where the cost is high.⁸¹ The social democratic trade-off is that where the fees charged affect access to benefit, OSCR expects the restrictive impact to be mitigated – in the case of an independent school by a combination (under the first and second principles) of facilitated access to the school's main benefit, its school education, and access at no cost or minimal charge to other benefits provided by way of wider community engagement, in particular with the wider educational community.⁸²

Facilitated access – help for those who cannot pay such as bursaries and discounts – should make 'provision for people with a wide range of incomes including low incomes', and 'forms of facilitated access which are clearly linked to the financial situation of potential beneficiaries (for instance through means-testing)' – as opposed, for instance, to scholarships tied to academic merit – 'are likely to have the greatest impact' in mitigating the restrictive effect of substantial fees.⁸³ Support for payment of fees may come from the school itself, funded by

⁷⁷ *Scottish Parliament OR* (9 June 2005) Col 17852.

⁷⁸ Cf OSCR's treatment of ALEOs: Cross and Ford (n 66) paras 9.25, 9.26.

⁷⁹ See OSCR, *Pilot Study* (n 63) app 4 and (now) *Meeting the Charity Test* (n 68) 90.

⁸⁰ See especially *Re Resch's Will Trusts* [1969] 1 AC 514, as interpreted in Charity Commission, *Public Benefit – the Legal Principles* (Charity Commission, 2005) A21–A24.

⁸¹ *Meeting the Charity Test* (n 68) 90. For application of the five principles in practice see, eg, the Fettes Trust report (n 75).

⁸² OSCR, *Fee-charging schools* (n 62) paras 5, 10.

⁸³ See the Fettes Trust report (n 75) 8. The school revised its facilitated access provision on initially failing the charity test, increasing means-tested awards (representing 8.4% of the school's available income) to 10.6% of the school roll; within the 10.6%, 3.7% of the roll received awards in the range 81–99% of fees, and 0.8% 100% remission; together with a range of community engagement activities offered at no or nominal charge, the revised provision enabled the school to meet the charity test on re-assessment. See also *Fee-charging schools* (n 62) para 10.

its own fee and other income, from separate but associated endowment funds, or from third party sources unconnected with the school.⁸⁴ The proportionality principle requires that the more substantial the fees, the more should be put in place by way of facilitated access to the main benefit or access to other benefits provided at no or minimal charge. The transparency principle demands that arrangements for facilitated access be properly publicised to those who may be eligible to take advantage of them.

The holistic nature of the charity test enables OSCR to take account of the 'full scope' of the benefits provided by a school free or for a nominal charge in mitigation of the restrictive effect of fees on access to its main benefit. As well as allowing 'regular and scheduled use of ... sports facilities and school grounds by local state primary schools',⁸⁵ providing free use of minibuses for local state schools,⁸⁶ contributing to the development of the Curriculum for Excellence (the standard curriculum for state schools), hosting student and probationary teachers from the state system as part of their training and professional development, and supporting the national examinations system by providing markers, moderators and other examining officials⁸⁷ – all of which may be seen as forms of engagement with the wider educational community – a school may engage constructively with the wider general community, for example by hosting a regional charity tennis tournament or making an indoor golf centre available to 'the Scottish Golf Union for the development of golf in Scotland and ... to the local community to promote golf to all ages'.⁸⁸

OSCR makes it clear that in decisions on restrictions on access, as on the assessment of public benefit generally, each case is to be considered on its own merits and that there are 'no absolute requirements, ratios or thresholds'.⁸⁹ '[I]t is for the charity to decide in what way it can best ensure that any fees or charges do not unduly restrict access to its benefits, but the overall decision on whether there is public benefit is for OSCR to make'.⁹⁰ The review reports on individual schools should, therefore, be regarded as no more than illustrative of OSCR's general approach to fee-charging, but there is no doubt that taken together they provide a clear working indication of what is expected – indeed required – of the independent schools sector in Scotland in return for the advantages of charitable status.⁹¹

⁸⁴ *Pilot Study* (n 63) para 5.6.2.

⁸⁵ See the Fettes Trust report (n 75) 12.

⁸⁶ OSCR, 'Loretto School Ltd. Scottish Charity Number: SC013978. Inquiry Report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act)' (www.oscr.org.uk/media/1616/2014-06-19_-_updated_s33_report_loretto.pdf, 2014) 12.

⁸⁷ *Pilot Study* (n 63) para 5.6.2.

⁸⁸ See the Loretto report (n 86) 12, 13: benefit generated under 'the advancement of citizenship or community development' (2005 Act, s 7(2)(f)) may mitigate restricted access to benefit under 'the advancement of education'.

⁸⁹ *Fee-charging schools* (n 62) para 5.

⁹⁰ See the Fettes Trust report (n 75) 7.

⁹¹ Cf England and Wales: Synge (n 45) 180.

OSCR's schools review can be seen to have had some success in meeting its implicit social democratic objectives. It has demonstrably raised the levels of facilitated access and wider community engagement in the case of at least nine of the 52 schools reviewed, with the probability that others raised their game in anticipation of assessment. While fee-mitigation measures are in detail a matter for the discretion of schools themselves, the 'stick' of removal from the register means that in practice OSCR can impose a remedial plan of steps required to meet the charity test on reassessment.⁹² OSCR intends for the future to maintain a 'higher level of vigilance' over the schools in its register than over charities generally, to guard against 'backsliding' from the requirements set by the review,⁹³ but it would be difficult now for OSCR, having completed the review, to revisit the requirements and revise them upwards. As an instrument of social democratic intervention in the independent schools sector, therefore, charitable status in Scotland may claim some success but has its limitations.

V. Should Independent Schools be Excluded from Charitable Status in Scotland?

Insistent voices are heard in Scotland calling for independent schools to be excluded from charitable status. Against the background of the status quo outlined in the previous section, should they be?

In 2014, a petition to the Scottish Parliament called for the removal of 'charitable status, and thus taxpayer support, from private, fee-paying schools'.⁹⁴ The petition cited 'the inherent inequity of taxpayer subsidy for these elitist institutions whilst their financially strapped state counterparts receive no such financial support'. The focus of the complaint was the 80 per cent relief from non-domestic rates accorded to independent schools, but not to state schools, which pay rates in full. More recently, *Third Force News*, the magazine of the Scottish Council for Voluntary Organisations, gave prominence to a survey of readers in which 77 per cent thought that private schools should not be charities.⁹⁵ The report highlighted the UK-level reliefs available to independent schools as well as local rates relief and quoted a survey respondent's remark that 'they are not providing a public benefit and only serve a minority of the population who are given an unfair advantage in life because of their wealth and privilege'.⁹⁶

⁹² Eg, the Fettes Trust report (n 75); see also OSCR, 'File Note: Hutchesons' Educational Trust. Report under s 33 of the Charities and Trustee Investment (Scotland) Act 2005 on Inquiry: Hutchesons' Educational Trust (SC002922)' (www.oscr.org.uk/media/1489/inquiry-report-hutchesons-educational-trust.pdf, 2011).

⁹³ *Fee-charging schools* (n 62) para 14.

⁹⁴ Public Petition No PE01531, 2014. The petition garnered 310 signatures in support.

⁹⁵ S Smith, 'Is the charity brand tarnished?' (*Third Force News*, 28 August 2018). The survey was of 148 readers; 14% thought private schools should be charities, while 9% were not sure.

⁹⁶ *Ibid* 12.

The petition and survey disclose the same egalitarian concerns as the calls for abolition: independent schools are socially divisive, they divert resources from the main state system, and the manifest unfairness of their receiving rates relief while state schools pay in full highlights the deeper injustice that access to the best and best-funded schools depends on a family's ability to pay fees. For the egalitarian, while it might be conceded that independent schools registered with OSCR must provide at least some public benefit, OSCR has not extracted enough in public benefit in return for the tax reliefs conceded, and the public funds absorbed by the reliefs would be better spent on state schools. A second-best to the outright abolition of independent schools, therefore, would be for the Scottish Parliament to step in and exclude them from charitable status.

The free-market liberal might point out that the petition's rates comparison does not compare like with like: mainstream independent schools are funded entirely by private money apart from charity tax reliefs, whereas state schools are funded entirely by the taxpayer. The public funding of state schools takes into account their obligation to pay rates, so if state schools are inadequately funded it is because the overall education budget is insufficient, not because they pay rates.⁹⁷ If, on the other hand, independent schools are generally well-funded that is largely through the input of fee-paying families – families already contributing to the main state system through payment of taxes – with a comparatively modest input from public funds by way of tax reliefs. While the free-marketeer would concede that if the tax reliefs were withdrawn the public funds saved could in theory be devoted to improving state schools, in the case of rates relief this would mean a change in the existing arrangements for local government finance. Under present arrangements the additional rates collected would be retained by a local authority but its overall grant from the Scottish Government would be liable to a corresponding reduction, so provision would have to be made for the extra rates collected to be earmarked for the local authority to spend on its state schools without any balancing adjustment to the overall grant.⁹⁸ So far as the other tax reliefs are concerned, there would be difficulties in calculating the funds saved,⁹⁹ as well as in allocating funds saved at UK level down to an education budget administered at devolved level. It might be doubtful also whether the sums involved, though significant for individual schools when enjoyed as tax relief, would bring about a material improvement in the main state system if reallocated as a supplement to the Scottish Government's education budget.¹⁰⁰

⁹⁷ The overall level of local authority budgets is centrally controlled by the Scottish Government: *Barclay* (n 5) paras 3.40–3.43.

⁹⁸ *Ibid* ann C, C36. See also Local Government and Communities Committee, *Stage 1 Report on the Non-Domestic Rates (Scotland) Bill* (SP Paper 596, 2019) para 108.

⁹⁹ See text to n 57.

¹⁰⁰ Net Revenue Expenditure on education by local authorities was budgeted at over £5bn for 2018–19: Scottish Government, *Scottish Budget 2019–20* (Scottish Government, 2018) 87, Table 6.16; cf an anticipated saving in rates relief of £7m (see n 56).

In turn, the social democratic interventionist might defend the status quo by insisting that, so long as the broad tenor of Scottish society remains as it is – economically liberal but with strong egalitarian aspirations – and fee-charging schools are permitted to exist, their public benefit commitments under the charity test provide a genuine counterbalance to their social and financial exclusiveness by stimulating facilitated access and community engagement at significantly higher levels than would be arrived at otherwise. So, although the calculations cannot be exact, it can be said that the taxpayer does in fact receive value for money in return for charity tax reliefs.¹⁰¹

As in the case of the arguments for and against abolition, these differing views on exclusion reflect differing visions of society which belong in the wider world of politics, not charity law. Whatever the policy adopted, however, certain technicalities would have to be taken into account in any project for reform.

A. Technicalities of Exclusion

As a first step, the Scottish Parliament might provide that any body registered as an independent school in Scotland would be automatically disqualified from registration in the Scottish Charity Register, with appropriate exceptions for the special-case schools. The schools currently entered in OSCR's register would be removed and would cease to be charities but would continue in existence as non-charities. Secondly, however, consideration would have to be given to the operation of the de-registration asset lock. Unless disapplied by order, the asset lock would oblige each school to continue to apply its pre-removal assets in accordance with its purposes as they stood immediately before removal, although not necessarily, as the provisions for the asset lock stand, in such a way as to provide public benefit in accordance with the charity test.¹⁰²

The schools would lose the various advantages of charitable status linked directly to registration with OSCR, in particular reliefs from non-domestic rates and LBTT. It is not a foregone conclusion, however, that de-registration would automatically deprive them of charity reliefs at UK-level without supplementary legislative intervention by the UK Parliament.¹⁰³ Thirdly, therefore, it would have to be decided whether exclusion from charitable status should involve loss of UK as well as Scottish tax reliefs and the support of Westminster solicited as necessary.

¹⁰¹ See Biggar Economics, *Economic Impact* (n 32) 7 and 8.

¹⁰² 2005 Act, s 19(1), (8). See Scottish Government, *Consultation on Scottish Charity Law* (Scottish Government, 2019) paras 68–72 for proposals for amendment.

¹⁰³ See n 55. *Prima facie* a compulsorily de-registered body could still meet the conditions of relief for UK-level tax relief because it is not subject to 'any requirement' to be registered in the Scottish Charity Register: Finance Act 2010, s 30, sch 6, para 3(3).

B. Alternative Approaches – ‘Sink-or-Swim’

Given these technicalities, two contrasting approaches to exclusion might be considered. The first would proceed on the hard-line egalitarian basis that mainstream independent schools are elitist and socially divisive organisations which undermine the main state schools system and ought not to be charities. Independent schools would be excluded from charitable status and left to sink or swim without its advantages. The schools in OSCR's register would be de-registered and express provision made to oblige them to apply their pre-removal assets for their pre-removal purposes in full conformity with the charity test; so facilitated access and wider community engagement would still be required. It would be expressly provided also that the schools would lose UK-level charity reliefs along with the other advantages of charitable status. For a Scots egalitarian, enlisting the support of Westminster for this element of the reform might be politically delicate, possibly involving a cap-in-hand approach to a UK Government disinclined to implement a specifically Scottish adjustment to the UK tax system, but excluding independent schools from charitable status in Scotland would lose half its point if it did not involve exclusion from all charity tax reliefs. Change along these lines would undoubtedly make life more difficult for Scottish independent schools and the families they serve.¹⁰⁴ The loss of tax reliefs would mean increasing fees or cutting costs and standards, or a combination. Some schools, already on the edge of viability, might cease to operate. For boarding schools, the loss of reliefs would make it harder to compete with their equivalents in England and Wales in the UK and international markets for boarders.

How effective would the ‘sink-or-swim’ approach be as a social democratic response to egalitarian concerns? On the one hand, the ultimate goal of abolition would be achieved in part, indirectly, if some independent schools went out of business, while the remainder would still be obliged to facilitate access and engage with the wider community but without the *quid pro quo* of tax reliefs; and the public funds saved could be applied to the state education budget. On the other hand, the schools most likely to survive would be the most prestigious and exclusive, which could command higher fees and would in consequence become more exclusive; bursaries would continue for a minority, but families only just able to meet fees at current levels would be pushed out and the fee-paying majority would be drawn from the better-resourced cohorts of the well-off. There would be a danger, too, that cost-cutting might engender a box-ticking response to the ongoing public benefit obligations under the charity test, with access and community engagement commitments trimmed to the minimum. In these circumstances, in

¹⁰⁴ See Biggar Economics, *Economic and Fiscal Contribution of Edinburgh's Independent Schools: A report to Edinburgh's Independent Schools* (SCIS, 2018) para 6.4. Exclusion from UK-level charity reliefs might also be brought about by a Labour government at Westminster without any stimulus from Scotland: see n 25.

the absence of the carrot of tax reliefs, the efficacy of the asset lock as an enforcement mechanism would come under scrutiny. It would be questionable whether OSCR, with responsibility for over 24,000 charities, and with lesser powers under the asset lock than under the main charities regime, would be in practice an appropriate agency to oversee the ongoing public benefit commitments of a small group of former charities.¹⁰⁵ And as already noted, application of the funds saved in tax reliefs to achieve measurable improvements in the main state system would not be straightforward.¹⁰⁶ Overall, therefore, the merits of exclusion on a 'sink-or-swim' basis would be mixed.

C. Alternative Approaches – 'Education, not Charity'

An alternative would be to take mainstream independent schools out of the charities system altogether, not in order to punish them for elitism, but to integrate them more fully with the main state education system and to maximise their contribution to it. The starting point would be that charitable status is an imperfect instrument for implementing educational policy,¹⁰⁷ and that wider access to independent schools and their engagement with the state schools system and wider community belong in the sphere of education, not charity law. Under the charity test, commitments in these areas are in principle left to the discretion of each school, with OSCR as the arbiter of their public benefit value, but it is not OSCR's role to take a policy overview of the commitments at sector level.

One of the chief merits of this alternative would be to move the debate on independent schools away from the specifics of charity law and taxation to where there could be open discussion, as a matter of educational policy, of how best to reconcile egalitarian aspirations with freedom of choice, perhaps by social democratic intervention going well beyond the requirements of the charity test. The issues of social divisiveness and diversion of resources might be addressed by building on existing commitments, but under the banner of an educational partnership between the independent and state school sectors in the service of the declared objective of the current reform of the main state system: 'to close the unacceptable gap in attainment between [the] least and most disadvantaged children [in Scotland] and to raise attainment for all'.¹⁰⁸

On this approach, independent schools would be removed from OSCR's register and the de-registration asset lock would apply, but in adapted form. A school's ongoing obligation to administer its pre-removal assets in accordance with its

¹⁰⁵ For the practicalities, see OSCR, *Protecting the assets of former charities: OSCR's monitoring of charitable assets 2006–11* (OSCR, 2012).

¹⁰⁶ There would also be at least the possibility of a challenge to the withdrawal of tax reliefs under the European Convention on Human Rights, Protocol 1, art 2: see Morris (n 25) 26, 27.

¹⁰⁷ See Dunn (n 27) 501–513; also Synge (n 45) ch 10.

¹⁰⁸ See n 11.

pre-removal purposes would be overseen by Education Scotland instead of OSCR, and its public benefit commitments under the charity test replaced by parallel obligations applied through the registration regime for independent schools and aimed at closer integration with the main state system. There might be a place for the schools, for instance, in the Regional Improvement Collaboratives currently being developed for state schools, where they might have useful contributions to make on operational autonomy, school leadership and parental engagement. For the old endowment and proprietary day schools, this might be something of a return to the old days, when their own educational provision and the provision of the state secondaries could be thought of as complementary: having grown apart since the introduction of comprehensives, the new direction being urged on state schools might bring state- and privately-funded schools closer together again. Engagement with the wider public might be systematised on the model of modern community campuses, where state schools and the general community share facilities such as swimming pools and gyms.

On this approach, state subsidy for independent schools would be a matter for transparent policy debate. The schools would lose their charity tax reliefs – in principle at both devolved and UK levels – and any taxpayer support would come from the state education budget if anywhere. The egalitarian might resist any form of public subsidy, while the free-market liberal might highlight the positive role of fee-payers as part-funders of Scottish school education and seek at least some state support, arguing that the effect would be to reduce fees and open up schools to a wider range of fee-paying families. For the social democrat, the challenge would be how best to harness for the wider public good the willingness of those who can afford it to pay high fees for their own family's education. Any state subsidy decided on could be tied more accurately to the actual costs to schools of their service to the wider community than tax relief under the present system.

On the face of it, the 'education, not charity' alternative has at least the potential to meet egalitarian concerns more constructively than the 'sink-or-swim' approach. Much goodwill would be needed on all sides to make it work in practice and, ideally, usher in a genuine revival of the pre-comprehensives era of equality of excellence between independent and state schools. As things stand, however, nothing of this kind has been mooted by the Scottish Government, which must surely have its energies fully engaged with the current reform of the state sector without adding independent schools to the equation.

D. *Should Independent Schools be Excluded from Charitable Status in Scotland?*

The policy of the present Scottish Government towards mainstream independent schools, adopted from its predecessors, can be characterised as pragmatic with a social democratic dimension. The schools are permitted to operate with maximal autonomy and minimal regulation, funded largely by fee-payers though

with modest state subsidy in the form of charity tax reliefs; concerns as to social divisiveness and detriment to the state sector are addressed by mitigation arrangements mediated through the charities system as a *quid pro quo* for tax reliefs. If independent schools are not to be abolished in Scotland, therefore, any proposal for excluding them from charitable status must be judged on its social democratic merits as against the status quo.

By this yardstick, the merits of the 'sink-or-swim' approach are mixed. The alternative 'education, not charity' approach has much more to offer, not least by relocating the debate about mainstream independent schools in Scotland firmly in the sphere of education. Whatever its merits in theory, however, in practice this approach, for the moment at least, has no political champions. So, the status quo has its attractions, despite its blurring of charity law and educational policy. Should independent schools be excluded from charitable status, therefore? On balance, no, and it is easy to see why, in the face of calls for exclusion, the Scottish Government's response has until recently been to allow the status quo to stand: whether an independent school meets the charity test is for OSCR to decide, in the light of the adequacy of the school's facilitated access and community engagement commitments, and if it does meet the test it is entitled to the full range of advantages attaching to charitable status.

VI. Should Independent Schools Enjoy the Full Range of Charity Tax Reliefs?

If mainstream independent schools are not to be abolished in Scotland and are not to be excluded from charitable status, should they be allowed the full range of tax reliefs accorded to charities generally? It seems clear that before Barclay, the Scottish Government would have answered 'yes'. Now, mainstream independent schools which are charities are set to lose their mandatory entitlement to 80 per cent relief from non-domestic rates while retaining their charitable status and its other advantages.¹⁰⁹ They are also to be excluded from the possibility of receiving discretionary relief from local authorities under the existing power to remit up to 100 per cent.¹¹⁰

The Barclay recommendation resembles a mild version of the 'sink-or-swim' approach to exclusion and can be seen to have similarly mixed merits. The schools are still to be subject to the public benefit requirements of the charity test, but there is a risk that loss of relief will lead to higher fees and greater exclusivity and

¹⁰⁹ See n 6. Provisionally, relief would be removed from 2020–21. Additional Support for Learning schools and specialist music schools would be exempted: Non-Domestic Rates (Scotland) Bill, s 10(3), (4). The proposal assumes the ongoing availability of charity reliefs at UK level, but see (now) n 25.

¹¹⁰ See LG(FP)(S)A 1962, s 4(5). The power has up to now been exercisable only in respect of the 20% balance above mandatory relief for charities.

to box-ticking on facilitated access and community engagement.¹¹¹ There may be a risk also that with the carrot of advantages much reduced Scottish charitable status may cease to be attractive to some mainstream schools, which may contemplate voluntary removal from OSCR's register despite the disincentives.¹¹² They might yet retain tax reliefs at UK level,¹¹³ and loss of use of the charity brand might have little impact on the loyalty of their main donor base of parents and alumni. They would be bound under the asset lock to apply their pre-removal assets for their pre-removal purposes, but most schools would plan to do that anyway. Crucially, however, as the provisions of the asset lock stand, by de-registering, a school would release itself from its public benefit commitments under the charity test. If, in the event, the schools retained eligibility for UK tax reliefs, that would require much less demanding levels of public benefit provision than the charity test.¹¹⁴

As the rationale for its recommendation, Barclay pointed to the fact that state schools do not enjoy the same relief as independent schools and generally pay rates – an 'inequality' which should be brought to an end.¹¹⁵ As we saw earlier, if removing charity rates relief from independent schools is to help state schools, local authorities must be permitted to retain the extra rates collected as a net addition to their education budget for expenditure, *prima facie*, on their own state schools. If this change were made, however, and local authorities retained discretionary power to grant up to 100 per cent charity relief to independent schools,¹¹⁶ that would open the way to a new form of partnership between local authorities and mainstream independent schools which might replicate certain features of the 'education, not charity' approach to exclusion suggested above. A local authority would be in a position to negotiate with the schools in its area for 'top-up' of the public benefit provided under the charity test in return for an award of discretionary rates relief. The baseline would be the commitments to facilitated access and community engagement already established, but these could be rationalised and extended in a way sensitive to local conditions, possibly within the framework of the Regional Improvement Collaboratives. Guidance could be provided by Education Scotland to ensure some consistency of approach across the Scottish schools system as a whole.¹¹⁷

The calculation for local authorities would be whether the state system in their area would receive better value for money from partnerships with independent

¹¹¹ See OSCR, *Submission: Call for views on the Non-Domestic Rates (Scotland) Bill* (OSCR, 2019) 2.

¹¹² Ibid. OSCR also points to the risk of damaging public confidence in charities and charity law by creating a 'two-tier' charity sector in which some charities are treated differently from others for certain purposes within a 'single-tier' regulatory system.

¹¹³ See n 55. If, under a Labour Government at Westminster, UK-level charity reliefs were withdrawn, that would be a further motive for voluntary de-registration: see nn 25 and 54.

¹¹⁴ See text to nn 46, 47.

¹¹⁵ Barclay (n 5) para 4.120.

¹¹⁶ *Pace* Non-Domestic Rates (Scotland) Bill Policy Memorandum, para 92, which dismisses this possibility without argument.

¹¹⁷ See Non-Domestic Rates (Scotland) Bill, s 11 for a proposed scheme of central guidance on discretion to remit.

schools developed in return for discretionary rates relief than from direct investment of the additional rates collected if relief were not allowed. A local authority could not push too hard, however. An independent school would make its own calculation of how much the relief being offered would be worth to it. If too much were being asked by way of top-up above its charity test commitments, a school could opt to forgo relief and pay rates in full, and possibly de-register voluntarily from charitable status altogether.

So, *should* independent schools which are charities be allowed the full range of tax reliefs accorded to charities generally? Ideally, perhaps, yes. The Scottish Government's original preference for the status quo, with its full carrot of advantages attaching to charitable status, had much to recommend it as likely to elicit a more than minimalist response to a school's public benefit obligations under the charity test. Removing half the carrot may have unintended consequences. It would still be possible, however, to replace that half of the carrot with the possibility of 100 per cent discretionary relief from local authorities.

VII. Conclusions – Relevance for England and Wales?

Revisiting here the three questions posed at the beginning of the chapter and summarising the conclusions arrived at provides an opportunity for a brief reflection on the possible relevance of the Scottish debate for England and Wales.

A. Should Independent Schools be Abolished?

In Scotland, there is limited political momentum for the abolition of mainstream independent schools, but egalitarian arguments for abolition inform persistent calls for exclusion of the schools from charitable status: independent schools are out of kilter with the comprehensives ideal, serve mainly a privileged minority who can afford high fees, divert resources from state schools by virtue of their better funding, financed by fees, and entrench privilege by delivering more favourable life chances to their fee-paying constituency than state schools to their non-fee-payers. Scottish Government policy is pragmatic: independent schools are quality schools, supply a significant proportion of day school provision in the main cities, and are largely self-funded; no abolition, therefore, but social democratic intervention through charitable status can take the edge off the ills identified by the egalitarian.

In England and Wales, the rationale for abolition, or at least for fundamental reform, is essentially the same – independent schools are ‘engines of privilege’ which flourish at the expense of the state system¹¹⁸ – but the educational landscape

¹¹⁸ See generally Green and Kynaston (n 25).

is different. State-supported secondary school provision is more varied than in Scotland,¹¹⁹ and English ‘public schools’, those expensive boarding schools with limited local loyalties, are a more prominent presence than their equivalents in Scotland and more glaringly exclusive than the large day schools in Edinburgh and Glasgow. The ‘gilded path’ from prestigious fee-charging school to power, influence and well-remunerated career, often via Oxbridge, is a statistically identifiable ‘British’ phenomenon,¹²⁰ but perhaps more clearly discernible in England than in post-devolution Scotland: of the six Scottish First Ministers so far, all but one – the first – attended state secondary schools.¹²¹ The Labour party’s revived interest in abolition is a more significant political phenomenon in England and Wales than in Scotland, though removal of UK-level charity reliefs by a Labour Government at Westminster would impact Scottish independent schools no less than those south of the Border. The policy of social democratic intervention through charitable status initiated by Tony Blair’s Labour has survived under Conservative governments, but operates against a more complex educational background than in Scotland, and seeks to bridge what is probably a larger privilege gap between the independent and state sectors.

B. Should Independent Schools be Excluded from Charitable Status?

In Scotland, with no real prospect of abolition, the focus has been on the efficacy of social democratic intervention. The status quo of intervention through charitable status can claim some success: levels of facilitated access and engagement with the wider educational and general communities have been raised and independent schools can be held to their commitments by OSCR. Certain distinctive features of the 2005 Act have allowed this: OSCR can review a charity’s conformity with the charity test periodically; the charity test authorises examination of a charity’s fee-charging practices as part of a factual assessment of its provision of public benefit, and the ‘unduly restrictive condition’ provisions and holistic character of the charity test in combination allow OSCR to accept facilitated access and community engagement in mitigation of high fees; and the stick of removal from the Scottish Charity Register gives OSCR a firm hold over uncooperative charities.

Exclusion from charitable status on a ‘sink-or-swim’ basis would be an uncertain advance on the status quo: fees and exclusiveness might increase, and removing the carrot of advantages while relying on residual enforcement by OSCR might compromise the public benefit commitments brokered through the schools

¹¹⁹ www.gov.uk/types-of-school.

¹²⁰ Green and Kynaston (n 25) 4–7.

¹²¹ The late Donald Dewar attended the independent Glasgow High School. The six include Jim Wallace, now Lord Wallace of Tankerness, who twice served as acting First Minister.

review without generating compensating improvements in the state sector. The alternative of exclusion on an 'education, not charity' approach might be the ideal in terms of both transparency and potential for social democratic intervention but has no political friends. So, in practice – but for the Barclay bombshell, and now the possibility of withdrawal of charity tax reliefs at UK level under a Labour administration – we would be left in Scotland with the status quo.

In England and Wales, Labour's original social democratic initiative can be declared a comparative failure in the light of the *ISC* case. The Charity Commission does not have the same power of periodic review as OSCR; the public benefit requirement in English charity law does not authorise application of a reasonableness test to fees, nor, in the case of a fee-charging school, negotiation of a mitigatory programme of bursary provision or collaboration with the state sector; and the Commission's power to remove an institution from its register cannot be used in the same straightforward way as OSCR's as a mechanism for enforcing a charity's public benefit obligations.¹²²

These weaknesses in the English arrangements have been acknowledged by a (Conservative government) proposal for legislation to remove the benefits of charitable status – but not charitable status itself – from schools which fail to meet specified benchmarks for bursary provision and partnership with the state system.¹²³ Independent schools which were charities would then be in broadly the same position as their equivalents in Scotland: the statutory benchmarks would be similar to the requirements for access and community engagement generated under the charity test, and the 'stick' of removal of the benefits of charitable status would be similar in effect to removal from OSCR's register.

Exclusion of independent schools altogether from charitable status in England and Wales on a 'sink-or-swim' basis – whether as an end in itself or as a step towards abolition – would be a major undertaking because of the size of the sector and the complexity and antiquity of English charity law;¹²⁴ so the 'sink-or-swim' option would be likely to fare even less well in a cost-benefit analysis than its equivalent in Scotland. The 'education, not charity' option would be no less of an undertaking but would have greater theoretical attractions. The benchmarks proposal may be criticised as intruding educational policy into charity law: the benchmarks would be set by the Department of Education and would override, for independent schools, the law on public benefit applicable to other charities – perhaps better, therefore, in the name of transparency, to remove independent schools from the ambit of charity and legislate for the desired social democratic outcomes as unequivocally matters of educational policy.

¹²² See Charities 2011 Act, s 34 and Synge (n 45) 239.

¹²³ *Charitable status* (n 57) para 4.1.

¹²⁴ See n 25. The ISC has a UK membership of 1,364 schools of which the vast majority are located in England and Wales: ISC, *ISC Census and Annual Report 2019* (www.isc.co.uk). As to the complexities, see Synge (n 45) 239.

In any event, the benchmarks proposal is currently in abeyance, with schools working towards similar standards voluntarily in cooperation with the Department of Education, although with the threat of legislation looming as a 'stick' in the background.¹²⁵ From a Scottish perspective, however, it looks as if something more definite may be needed, certainly in the context of renewed political enthusiasm for abolition.

C. Should Independent Schools Enjoy the Full Range of Tax Reliefs?

In Scotland, the Scottish Government has answered 'no' to this question and is promoting legislation to remove all charity rates relief from independent schools while leaving their charitable status otherwise intact. Again, there is a risk of higher fees and greater exclusivity and compromise of mitigation measures by cost-cutting. On the view that removal of the existing relief upsets a necessary balance between carrot and stick in the operation of charitable status as a means towards social democratic ends, the balance might be restored by allowing local authorities full discretion to award charity rates relief in return for top-up contributions to local education negotiated over and above those required by the charity test.

In England, it has not been Conservative government policy to follow Scotland's lead on rates relief, although the idea is being considered by the Welsh Government.¹²⁶ The analysis offered here for Scotland suggests that if the carrot of tax advantages is to be left intact in England, more work is indeed needed on the stick if charitable status is to be effective in pushing independent schools towards higher levels of bursary provision and collaboration with the state sector. Such considerations would, of course, be swept aside under the radical option for abolition now re-espoused by Labour, and the concomitant removal of charity reliefs at UK level would have a significant impact on the carrot-stick balance in Scotland also.

Overall, what message might be sent from Scotland as a contribution to the debate on the charitable status of independent schools in England and Wales? Perhaps, with due deference, a Scottish commentator might risk something like this:

Your 'private school problem' is bigger than ours. Your charitable status is less effective than ours as an instrument of social democratic intervention to mitigate the exclusiveness of fee-charging schools. You can either legislate to introduce schools-specific benchmarks into the public benefit requirement of your charity law and enforce them

¹²⁵ *Charitable status* (n 57) para 4.3.

¹²⁶ Answer to Commons Written question 216113 (4 February 2019); Answer by Minister for Finance and Trefnydd, Welsh Assembly Plenary (30 January 2019).

with the threat of removal of the advantages of charitable status, or you can bite the bullet and take independent schools out of the charities system altogether and address your problem head-on in the sphere where it properly belongs – the sphere of education. If you take the second option, large though the project will be, it can be progressed transparently, unclouded by the technicalities of charity law, with open discussion of the conflicts generated by differing visions of society – egalitarian, free-market liberal and variations in between – and their possible resolution, as a compromise option, by social democratic intervention. In Scotland, it seems likely that we will retain our own status quo, as adjusted post-Barclay, at least for the time being, but we will follow your ‘education, not charity’ project with admiration as representing the best way forward in theory, asking ourselves as the debate proceeds, ‘Can it be made to work in practice?’. If, in the event, charity tax reliefs come to be removed at UK level, we may well find ourselves following in your footsteps.